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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/846,394	05.02.2001	Kayoko Yamaguchi	Q64290	4035

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EXAMINER

PRATT, HELEN F

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 02/07/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

09/846,394

Applicant(s)

YAMAGUCHI ET AL.

Examiner

Helen F. Pratt

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 02 May 2001.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-14 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,3,5,7,9,11-14 is/are rejected.
- 7) ☒ Claim(s) 2,4,6,8 and 10 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

### Priority under 35 U.S.C. §§ 119 and 120

- 13) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. 09/469,161.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s) \_\_\_\_\_
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_ 6) ☐ Other: \_\_\_\_\_

**DETAILED ACTION**

***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 11-14 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claims 11 to 14 are indefinite in the use of the phrase "carbonate-free transparent drink". It is not known what is intended by the use of the word "carbonate-free". Applicant should probably say, "non-carbonated ....drink" or a "beverage free of carbonation".

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.

Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 3, 5, 7, 9, 11, 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Talkington et al.(4,960,602) in view of Emoto (6,458,395) and Tomida (5,914,149).

Talkington et al. disclose a beverage composition which contains a flavor and a sucrose fatty acid ester (SE) (col. 3, lines 41-70). Claim 1 differs from the reference in the use of a particular HLB and in the use of lysolecithin and in the beverage being

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acidic. Emoto discloses a gelatinous food product containing a gelling agent and emulsifying agents such as sucrose fatty esters and lecithin which can be used in amounts from 0.1 to 10% or to 3% in compositions with a pH of from 3.3 to 4 (col. 4, lines 25-31). It is noted that the compositions of Emoto are not drinks, but are gels. However, the reference does solve the problem of making a clear food composition, at a low pH. Little patentable distinction is seen between a gelled food product and a drink, as gels are liquid before they become gels. The composition can be clear when gelatin is used. Also, Tomida disclose that it is known to use SE and lecithin in a clear liquid food such as a tea beverage (abstract and col. 9, lines 40-45 and col. 3, lines 60-70). It is not seen at this time that the claimed HLB is not shown by the reference because the beverage is clear. The tea of the beverage is also considered to be a flavorant. Therefore, it would have been obvious to use the claimed HLB and a lysolecithin as taught by Tomida in the composition of Talkington to make a clear composition and to use the claimed pH in the composition of Talkington as shown by Emoto.

Claim 3 further requires the use of sucrose palmitate. Talkington et al. disclose the use of various fatty acids including palmitic (col. 4, lines 5-19). Nothing patentably distinct is seen at this time in the use of the particular SE. Therefore, it would have been obvious to use a known SE for its known function in the claimed composition.

Claims 5 and 7 further requires a polyglycerol fatty acid ester and monoglycerol FAE's with particular HLB's. Tomida discloses the use of such in quantities that do not affect the transparency of the liquid (col. 3, lines 60-70 and col. 4, lines 1-5). No particular HLB's of the esters as in claim 5 are disclosed. However, nothing unexpected is seen in the use of particular esters with particular HLB's at this time absent a showing to the contrary that the products of Tomida or Talkington et al. do not

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use HLB's within the claimed range. Therefore, it would have been obvious to use a known emulsifier in amounts which would not affect the clarity of the composition.

Claim 9 further requires particular polyglycerol fatty acid esters. However, these are well known emulsifiers used for their known function. It would have been obvious to use particular esters in the claimed beverage for their known functional characteristics.

Claims 11 and 13 further require that the beverage is carbonate-free. However, no carbonation is seen in Tomida, or the other references. Therefore, it would have been obvious to make a beverage which was not carbonated.

#### ***Allowable Subject Matter***

Claims 2, 4, 6, 8, 10 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Claims 12 and 14 would be allowable if rewritten to overcome the rejection(s) under 35 U.S.C. 112, second paragraph, set forth in this Office action and to include all of the limitations of the base claim and any intervening claims.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 703-308-1978. The examiner can normally be reached on Monday 4-10, Tuesday and Wednesday, Friday, from 9:30 to 6:00 and Thursday 4-10.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on (703) 308-3959. The fax phone

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number for the organization where this application or proceeding is assigned is 703-305-7718.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0651.



Helen Pratt, Primary Examiner

hp 1-29-03